Office of the Secretary
Service Date
March 9, 2005

BEFORE THE IDAHO PUBLIC UTILITIES COMMISSION

JOSEPH B. McNEAL, DBA PAGEDATA,	)	
	)	**CASE NO. QWE-T-03-25**
COMPLAINANT,	)	
	)	
vs.	)	
	)	
QWEST CORPORATION, INC.,	)	**ORDER NO. 29726**
	)	
RESPONDENT.	)	

In October 2003 Joseph McNeal dba PageData filed a Complaint against Qwest Corporation. PageData alleged that Qwest was not in compliance with the reciprocal compensation provisions of their current Interconnection Agreement. Qwest responded that the Complaint should be dismissed because the parties' Interconnection Agreement contains an arbitration clause. Qwest argued that the dispute should be resolved through arbitration. On January 19, 2005, the Commission issued Order No. 29687 declining PageData's invitation to resolve its interconnection dispute with Qwest. Because the approved Interconnection Agreement contains an arbitration clause, the Commission found that "the arbitration process is the first and foremost method for resolving disputes under [their] Interconnection Agreement." Order No. 29687 at 6. Consequently, the Commission dismissed the Complaint without prejudice.

On February 9, 2005, PageData filed a timely Petition for Reconsideration. PageData primarily asserts that the Commission erred in declining to resolve the complaint because the arbitration clause is unconscionable. After reviewing PageData's Petition, the Commission denies reconsideration as explained in greater detail below.

BACKGROUND

The procedural history of this case is contained in Order No. 29687. Briefly, on February 7, 2003, Qwest and PageData jointly filed an Application to adopt a previously approved Interconnection Agreement between Qwest and Arch Paging, Inc. pursuant to 47 U.S.C. § 252(i). The Application notes that PageData and Qwest reached agreement "through voluntary negotiation" to adopt the Arch-Qwest Agreement in its entirety. The parties' Agreement to adopt the amended Arch Interconnection Agreement was executed by both Qwest

and Mr. McNeal dba PageData. The Commission approved the Qwest-PageData Interconnection Agreement in Order No. 29198 issued February 25, 2003.

PageData filed its Complaint against Qwest pursuant to the federal Telecommunications Act of 1996 (47 U.S.C. § 251 *et seq.*) and Section 13.14 ("Dispute Resolution") of its Interconnection Agreement. Complaint at 1. Section 13.14 provides in pertinent part:

> If any claim, controversy or dispute between the Parties, their agents, employees, officers, directors, or affiliated agents ("Dispute") cannot be settled through negotiation, it shall be resolved by arbitration under the then current rules of the American Arbitration Association ("AAA"). The arbitration shall be conducted by a single neutral arbitrator familiar with the telecommunications industry and engaged in the practice of law. ...The Federal Arbitration Act, 9 U.S.C. Secs. 1-16, not state law, shall govern the arbitratability of all Disputes. The arbitrator shall not have authority to award punitive damages. All expedited procedures prescribed by the AAA rules shall apply and the rules used shall be those for the telecommunications industry. The arbitrator's award shall be final and binding and may be entered in any court having jurisdiction thereof. The prevailing Party, as determined by the arbitrator, shall be entitled to an award of reasonable attorneys' fees and costs. The arbitration shall occur at a mutually agreed upon location. Nothing in this Section shall be construed to waive or limit either Party's right to seek relief from the [Idaho] Commission or the FCC as provided by state or federal law.

§ 13.14, Qwest-PageData Interconnection Agreement (emphasis added).

THE COMMISSION'S PRIOR ORDER

In Order No. 29687 the Commission observed that the Interconnection Agreement contains an arbitration clause at Section 13.14. This arbitration clause provides that any disputes between the parties "shall be resolved by arbitration." Order No. 29687 at 5 (emphasis original). Given the presence of the detailed arbitration clause in their Interconnection Agreement, the Commission found that "the parties clearly contemplated utilizing arbitration when they cannot resolve their dispute informally." *Id.* at 6. The Commission also noted that the Supreme Court had recognized that arbitration "is a favored remedy" for resolving disputes. *Id. citing International Assoc. of Firefighters, Local 672 v. City of Boise*, 136 Idaho 162, 30 P.3d 940 (2001). Although Section 13.14 does not limit the parties' right to seek relief from this Commission or the Federal Communications Commission (FCC), the Commission found the

presence of a detailed arbitration clause should be "the first and foremost method for resolving disputes under the Interconnection Agreement." *Id.*

THE PETITION FOR RECONSIDERATION

PageData generally argues that the Commission erred in dismissing its Complaint in reliance upon the arbitration clause in Section 13.14. The Company maintains the Commission's reliance on the arbitration clause is misplaced for two reasons. First, PageData "claims the arbitration clause is unconscionable" and requests that the Commission schedule a hearing pursuant to *Idaho Code* § 28-2-302. Petition for Reconsideration at 3. PageData requests a hearing so that the parties may present evidence "to aid the Commission in making a determination" whether the arbitration clause is unconscionable.

Second, even if the Complaint is referred to arbitration, PageData insists that Section 252(i) of the federal Telecommunications Act requires "that the resolution of a reciprocal compensation dispute be filed . . . and available for adoption by other carriers." *Id.* at 2. It alleges there is "no mechanism in Idaho statutes" to make a private arbitration decision "available for adoption by other carriers." *Id.* In addition, PageData suggests that the arbitration decision must be approved by the Commission.

DISCUSSION AND FINDINGS

A. Unconscionability

PageData claims that the arbitration clause contained in its Interconnection Agreement is unconscionable and requests that the Commission convene an evidentiary hearing on that claim. The Company suggests that the arbitration fees imposed by the American Arbitration Association's (AAA) commercial rules and the costs of arbitration are prohibitive. Petition at 4. PageData's theory is the AAA arbitration fees and costs are so excessive that they effectively remove arbitration as a remedy for resolving the parties' dispute. We find PageData's argument unavailing for several reasons.

First, PageData asserts that *Idaho Code* § 28-2-302 requires the Commission to convene a hearing so PageData may present evidence regarding the alleged unconscionability of the arbitration clause. However, this statute does not confer jurisdiction upon this Commission. Section 28-2-302 is part of the Idaho Uniform Commercial Code – Sales. *Idaho Code* § 28-2-101. This section provides in pertinent part:

> (1) If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.
>
> (2) When it is claimed or appears to the court that the contract or any clause thereof may be unconscionable the parties shall be afforded a reasonable opportunity to present evidence as to its commercial setting, purpose and effect to aid the court in making the determination.

Idaho Code § 28-2-302 (emphasis added). As is evident from the plain text of this section, arguments and evidence of unconscionability must be presented to a court – not the Commission. As our Supreme Court noted in *Natatorium Co. v. Erb*, the Commission is not a court of law. 34 Idaho 209, 200 P. 348 (1921).

Second, the construction and enforcement of contracts is generally "a matter which lies in the jurisdiction of the courts and not the public utilities commission." *Lemhi Telephone Co. v. Mountain States Tel. & Tel. Co.*, 98 Idaho 692, 696, 571 P.2d 753, 757 (1977); *see also Idaho Power Co. v. Cogeneration, Inc.*, 134 Idaho 738, 9 P.3d 1204 (2000). Our Supreme Court recognizes that there are exceptions to this general rule. One exception is where both parties agree to let the Commission settle their contract dispute. *Afton Energy v. Idaho Power Co.*, 111 Idaho 925, 929, 729 P.2d 400, 404 (1986).[1] In this case, Qwest objected to our involvement and urges the Commission to decline to exercise jurisdiction. Qwest Response at 6-10. Thus, both parties do not agree.

Third, for an arbitration provision to be voided as unconscionable, it must be both procedurally and substantively unconscionable. *Lovey v. Regence Blue Shield of Idaho*, 139 Idaho 37, 42, 72 P.3d 877, 882 (2003). "Procedural unconscionability relates to the bargaining process leading to the agreement [or provision] while substantive unconscionability focuses upon the terms of the agreement [or provision] itself." *Id.* However, the Court held that an arbitration clause that required each party to pay its own costs is not unconscionable. *Id.* at 45, 72 P.3d at 885.

Our Supreme Court also recognizes that an arbitration clause "may be unenforceable if large arbitration costs preclude the party from effectively vindicating the party's federal statutory rights in the arbitral forum." *Murphy v. Mid-West National Life Insurance Co.*, 139

[1] The other exceptions are not pertinent here.

Idaho 330, 332, 78 P.3d 766, 768 (2003) *quoting Lovey*, 139 Idaho at 45, 72 P.3d at 885. This concept is independent from the doctrine of unconscionability. In *Murphy*, the arbitration clause in question required each party to pay for its own arbitrator and equally share the expenses of a third arbitrator and all other expenses of arbitration. In addition, the arbitration agreement provided that attorney fees and expenses for witnesses must be borne by the party incurring them. *Murphy*, 139 Idaho at 332, 78 P.3d at 768. The arbitration provision in *Murphy* stands in stark contrast to the arbitration provision contained in Section 13.14 of the parties' Interconnection Agreement. In particular, Section 13.14 provides for a single arbitrator and the prevailing party "shall be entitled to an award of a reasonable attorneys' fees and costs." Thus, the arbitration process encompassed in the Interconnection Agreement allows the prevailing party to fully recover arbitration costs and attorney fees. We do not believe that the terms of Section 13.14 render this arbitration provision unenforceable.

B. Filed Arbitration Decisions

We next turn to PageData's argument that there is "no mechanism in Idaho statute to [file] a private AAA arbitration decision" with the Commission and make it publicly available to other carriers for adoption under Section 252(i). We find this argument unpersuasive. Although there may be no statutory mechanism to publish an arbitration decision, we are unaware of any impediment why either party to the arbitration could not file such a decision as an amendment or clarification to their Interconnection Agreement. Indeed, the Washington Utilities and Transportation Commission recently ruled that both parties to an interconnection agreement bear responsibility for filing the initial agreement with state commissions. *Washington UTC v. Advanced Telecom Group, et al.*, Order No. 7 at ¶¶ 3, 14, 21 (Docket No. UT-033011, June 2, 2004); 2004 WL 1597624 (Wash. UTC). The Washington Commission also noted that other state commissions have recognized that both parties to an interconnection agreement are responsible for filing the agreement with state commissions. *Id.* at ¶ 23. While these decisions deal primarily with interconnection agreements, we see no reason why they would not be applicable to amendments or clarifications to interconnection agreements.

Finally, as we noted in our prior Order No. 29687, there is a strong public policy in favor of arbitration and arbitration clauses. Here the parties "voluntarily negotiated" the adoption of the Arch Interconnection Agreement in its entirety. While there is no dispute concerning the Commission's authority to approve interconnection agreements, we decline to

subsequently engage in interpretation and enforcement of this particular agreement that contains an arbitration clause. *Accord, Idaho Power Co. v. Cogeneration, Inc.*, 129 Idaho 46, 921 P.2d 746 (1996). Consequently, we deny reconsideration.

ORDER

IT IS HEREBY ORDERED that PageData's Petition for Reconsideration is denied.

THIS IS A FINAL ORDER DENYING RECONSIDERATION. Any party aggrieved by this Order or other final or interlocutory Orders previously issued in this case may appeal to the Supreme Court of Idaho pursuant to the Public Utilities Law and the Idaho Appellate Rules. See *Idaho Code* § 61-627.

DONE by Order of the Idaho Public Utilities Commission at Boise, Idaho this 9th day of March 2005.

PAUL KJELLANDER, PRESIDENT

MARSHA H. SMITH, COMMISSIONER

DENNIS S. HANSEN, COMMISSIONER

ATTEST:

Barbara Barrows
Assistant Commission Secretary

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